PAYING FOR HUMAN RIGHTS BEFORE THE BILL COMES
– TOWARDS A MORE COMPREHENSIVE DOMESTIC IMPLEMENTATION OF
INTERNATIONAL HUMAN RIGHTS NORMS IN AUSTRALIA∗

Introduction

Despite being actively engaged in human rights at the international level, Australia has no federal Bill of Rights. How then does its international engagement translate into domestic application of human rights norms?

There are two parts to the answer. First, to date, the domestic invocation of international norms has been ad hoc. It has come through select executive, legislative and judicial initiatives. Those measures have drawn upon some international covenants to which Australia has become a party through executive actions in ratifying relevant covenants. Legislation has given local effect to some of those covenants. There has also been development of the common law by the courts in applying some international human rights norms in cases decided by them.

Secondly, and more substantively, Australia has established a Human Rights Commission at the federal level,1 with State counterparts.2 Those bodies educate on human rights topics and monitor obedience to some of those human rights norms that have translated into domestic legislation.

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2 Established under the Human Rights and Equal Opportunity Commission Act 1986 (Cth)

1 See the Equal Opportunity Act 1984 (SA) s.8; Anti-Discrimination Act 1977 (NSW) s.122T; Anti-Discrimination Act 1991 (Qld) s.234; Equal Opportunity Act 1995 (Vic) s.160; Anti-Discrimination Act 1998 (Tas) s.5; Equal Opportunity Act 1984 (WA) s.7.
Notwithstanding this combined answer, there remains a lacuna. There is no single source to which courts, the legislature and the executive may turn for definitive guidance on questions of human rights with which they have to deal. In particular, there is no single repository of those international human rights norms that have domestic operation. A more comprehensive response is required. The missing ingredient, it would seem, is a federal Bill of Rights.

There are a various possibilities for a more complete domestic implementation of international covenants. These include the types of Bills of rights working in other jurisdictions. This includes countries whose jurisprudence is referred to in Australian courts in a variety of areas, namely the United States, Canada, New Zealand and the United Kingdom.3

The best known of these is the United States model: a Bill of Rights that has been constitutionally entrenched enumerating a broad set of rights enforceable in the courts. Legislation that fails to comply with those rights is amenable to being judicially declared beyond power and invalid. Under this model, it is the courts which have the final say on the validity of any government action. Other models, such as those used in Canada, New Zealand and the United Kingdom differ in the varying supremacy that is given to the legislature over to the courts.

The Australian model of *ad hoc* implementation does have its advantages. The Australian approach is *laissez-faire*. It requires the minimum of consensus among those who are affected by members of a federal polity concerning the implementation. This *ad hoc* approach also requires little or no constitutional development or reform.

But it has distinct limitations as a method for delivery of international human rights norms into the domestic sphere. The current Australian model is inadequate as an ultimate method for implementation for at least two reasons. First, the *ad hoc* approach leaves a

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3 Australian courts frequently cite judicial authorities from the United States, Canada and New Zealand. It has also been traditional to refer to United Kingdom authorities. Examples of areas in which decisions of those jurisdictions are cited, to name but a few, where those foreign decisions have helped shape the relevant jurisprudence include tort (*Perre v Apand* (1999) 198 CLR 180), equity (*Barker v Duke Group (In liq.*) (2005) 91 SASR 167, competition law (*Boral Besser Masonry v ACCC* (2003) 215 CLR 347 and *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90) and human rights (*Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 194). There are many other examples in public law, criminal law, contract and corporations law, to name but a few more areas.
number of norms to which Australia subscribes internationally unimplemented at the domestic level. Not all international covenants containing human rights norms that have been ratified by Australia have been translated into domestic legislation. Secondly, and consequentially, the *ad hoc* approach falls short of international obligations to implement norms, which actually form part of some of the covenants that Australia has ratified. For example, in the *International Covenant on Civil and Political Rights*,⁴ there is an obligation⁵ to take necessary steps, in accordance with constitutional processes, to:

- to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant …
- ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity …
- ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy …
- ensure that the competent authorities shall enforce such remedies when granted.

Australia has ratified obligations for implementation that go beyond those that have been legislated to date. The current approach to implementation gives scant effect to the obligations to provide an effective remedy for violations with respect to rights contained in the covenant.⁶ Additionally, leaving domestic courts without the guidance of comprehensive legislative repositories of international norms means that the development of the common law in the area of human rights will be uncertain, although potentially broad. The courts have shown uncertainty as to the extent to which human rights norms are able to inform the development of the common law.

Recently, the common law tradition proved equal to the task of protecting of international human rights norms in the domestic sphere: the celebrated decision of the United States

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⁴ Ratified by Australia on 13 November 1980.
⁵ Article 2. See also *International Covenant on Economic, Social and Cultural Rights (1966)* Art. 2., which provides for a similar obligation on party states to implement machinery for enforcement. The covenant was ratified by Australia on 10 March 1976.
Supreme Court in *Hamdan v Rumsfield*\(^7\) relating to the illegality of military commissions established to try detainees at Guantanamo Bay, Cuba. The case was brought by a detainee at the facility. Although not an American citizen, he successfully invoked the country’s domestic judicial system to protect his rights. The decision reflects a willingness by United States superior courts to use judicial review\(^8\) of executive actions to protect human rights. The majority showed a preparedness to allow international law to inform their domestic decisions. Like the United States, Australian courts review legislation and executive acts for the constitutional validity and compliance with legislative mandate.

It is a well established feature of Australia’s judicial culture as part of the Rule of Law to review the conduct of government at the suit of the citizen\(^9\) But the landmark decision raises the question as to what might have been the result if the matter been heard before the High Court of Australia.\(^10\) The outcome is less than clear. The High Court has yet to definitively address the role it is willing to play in enforcing human rights norms and giving effect to Australia’s international obligations. This demonstrated contrast between the position in Australia and that of the United States, highlights the growing gap between Australian law and that of much of the common law world, including those jurisdictions upon which it draws for precedent, mentioned above.

The position of international human rights in Australian law demands comprehensive clarification. Enter an Australian Bill of Rights. In Australia, there is discussion as to what form such a Bill of Rights should take in seeking to implement international human rights norms.\(^11\) The debate, in part, is whether emphasis should be given to supremacy of the courts, the legislature or executive.

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\(^7\) *Hamdan v Rumsfield* 2006  The citation of the slip opinion 548 US _ (2006). The slip opinion is available as a PDF file at [www.supremecourtsus.gov/opinions/05pdf/05-184.pdf](http://www.supremecourtsus.gov/opinions/05pdf/05-184.pdf). References are to pagination contained in the majority opinion.

\(^8\) The role of the United States Courts’ to review executive and legislative acts for their constitutional validity was established in *Marbury v Madison* 5 US (1 Cranch) 137 (1803) and *McCulloch v Maryland* 17 US 316 (1819).

\(^9\) See, e.g., *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *James v Cth* (No.2) (1939) 62 CLR 339 and *Kable v DPP* (1996) 189 CLR 5


\(^11\) The University of Melbourne Law School Centre for Comparative Constitutional Studies has summarised much of the debate: [http://www.law.unimelb.edu.au/cccs](http://www.law.unimelb.edu.au/cccs)
This is more than a matter of appearance, as *Hamdan* illustrates. Without universal access to courts to enforce rights, such rights are left in the political sphere. And the court of public opinion is too often a fickle arbiter. It is argued here that the most effective manner in which to apply international human rights norms domestically (and fulfil obligations to implement) is by an entrenched Bill of Rights that provides remedies through the courts to individuals.

Passage of a Bill of Rights into law is a necessary but not sufficient satisfaction of a country’s international obligations with respect to human rights. There must be entrenchment\(^{12}\) and enforceability.\(^{13}\) A Bill of Rights that can be readily amended, abrogated or repealed by subsequent legislation would not be an effective discharge of obligations to implement human rights norms at the domestic level. Access to the courts for remedies in cases of contravention has great effect in promoting rights as a social culture.\(^{14}\) Allied to this is the need for an independent regulator that has roles of education and enforcement in the area of human rights. Australian experience with admirable fulfilment of that role by the Human Rights and Equal Opportunity Commission demonstrates that the presence of such a regulator is critical to a serious endeavour to implement international human rights norms domestically. But a Bill of Rights of the kind described would complete the picture that is, at the moment, sketchy in form and in some respects lacking in substance. A robust approach seems to be called for if human rights are to be taken seriously.

Arguments against the implementation of a robust model do exist. First, there is the assertion that the common law adequately protects rights. Secondly, there is the argument that human rights are best left unarticulated, lest the words of the legislature enacting the Bill of Rights be given undesired outcomes when they come before the courts. Thirdly, it is advanced that if it is insisted that a Bill of Rights be entrenched, then there is the practical argument that the requisite constitutional amendment required to

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\(^{12}\) That is, it should not be amenable to amendment or repeal by ordinary legislative process.

\(^{13}\) That is, standing should be conferred upon anyone affected by a breach to bring the matter to court for appropriate remedies.

\(^{14}\) And is in keeping with the tradition of enforcement of rights in the courts.
entrench can be difficult to achieve\(^\text{15}\). A Bill of Rights that depends upon constitutional amendment is politically unlikely to eventuate in Australia.

The response to the first and second arguments is that, when looking at the current experience, a Bill of Rights could only present an improvement. As things currently stand, there are various expressions of rights, strewn through international covenants to which Australia is a party, the Constitution, pieces of legislation and various pronouncements of the courts. What harm could be done if just the existing normative statements were to be collected into a single instrument called a Bill of Rights?

As to the third, it is suggested that there are methods of entrenchment other than constitutional amendment. Two possibilities exist. First is the referral of State powers to the federal legislature.\(^\text{16}\) The second is a co-operative legislative scheme backed by intergovernmental agreements.\(^\text{17}\) Success with the constitutional referral of powers from States to the federal parliament\(^\text{18}\) and the use of co-operative legislative schemes\(^\text{19}\) both offer patterns for entrenched implementation, which are more readily effected than the route of constitutional amendment.

Use of the first mechanism would see the States and Territories conferring upon the federal Parliament all of their residual legislative powers with respect to human rights. The referral option would have attraction if it were considered that the federal Parliament lacked a power that the State Parliaments possessed and if that were necessary for a comprehensive Bill. However, this mechanism may fall short of what is possible and is arguably unnecessary for two reasons. If it were only international norms that were under consideration for inclusion in a Bill, the federal legislature already has all of the

\(^{15}\) Section 128 of the Constitution, dealing with amendments, is notoriously difficult to satisfy. Of 44 proposed amendments, only 8 have succeeded.

\(^{16}\) Pursuant to Constitution s.51(๑๙๘), which confers power to legislate concerning subjects on which the States concur.

\(^{17}\) Co-ordinate legislation, specified by intergovernmental agreements are passed by each participating legislature.

\(^{18}\) A recent example is the Corporations Act 2000 (Cth).

\(^{19}\) Examples of national schemes include the Jurisdiction of Courts (Cross-vesting) Acts 1986 and the Competition Codes 1995. However, note the limitation upon national legislative schemes in respect of States conferring their jurisdiction on federal courts formed under Chapter III of the Constitution in Re Wakim: ex parte McNally (1999) 198 CLR 511. Note also that a co-operative legislative scheme with respect to international human rights implementation would not suffer the same federal power deficiency because of the federal legislative power with respect to external affairs under section 51(๑๙๘).
legislative power necessary. Further, if it is only the power to legislate that is conferred, as opposed to a choate, fully developed Bill, all that has been empowered is the passage of a Bill that could be amended or appealed with the same ease as any other piece of legislation.

Whether the referral power is used or not, is a matter for judgment once the content of a potential Bill is settled. But there would need to be an added dimension of entrenchment by way of intergovernmental agreements. A co-operative legislative scheme implemented pursuant to intergovernmental agreements would provide a mechanism for entrenchment short of constitutional amendment.

The Guantanamo Bay Detainees’ Military Commission: A brief consideration of Hamdan v Rumsfeld

The United States Supreme Court’s decision in *Hamdan v Rumsfeld* offers insight into many of the issues that inform the domestic implementation debate. To what extent is the judiciary willing to protect human rights norms? What role can traditional common law protections play? What is the appropriate status to be given to international human rights treaties in domestic courts? To what extent can the judiciary in a separation of powers offer human rights protections where the legislative and executive have failed to do so? Does the domestic common law of Australia provide an adequate safeguard in relation to what many would regard as fundamental rights, such as, the presumption of innocence, a fair trial and the right to liberty in the absence of an early trial?

These questions raise for consideration the need in Australia for a more comprehensive implementing of human rights norms at the domestic level. It is, therefore, a useful starting point to analyse the answers given by the Supreme Court and consider how the approach of the High Court might differ.

The Supreme Court decision displays a willingness to use those judicial decision-making tools traditionally employed in the common law to offer a degree of human rights protection. It does not reflect an idiosyncratic or vague commitment to human rights

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generally. Instead, the Court employs established common law judicial methods, including statutory interpretation, enforcement of the common law writ of *habeas corpus* and notions of a fair trial under both common and military law in its decision making process. In that process, specific reference is made to international custom and conventions as sources for common law development.

The Supreme Court’s findings included the following:

- Where possible the Supreme Court will interpret statutes so as to preserve its own jurisdiction and the availability of judicial review;\(^\text{21}\)

- The common practice of abstention of civilian courts in the application of military justice systems could not be applied to a detainee who was not a member of the United States military;\(^\text{22}\)

- Since the power to create and invoke the military commission was not legislatively derived, any Presidential authority to create such commission must be justified under the law of war;\(^\text{23}\)

- The Geneva Conventions are undeniably applicable as part of the law of war or under the Uniform Code of Military Justice;\(^\text{24}\)

- The structure and procedure of the commission established to deal with the “*unlawful combatants*” detained at Guantanamo Bay violates both the Uniform Code of Military Justice and the four Geneva Conventions. Invalid procedural “powers” of the commission included the exclusion of the accused and civilian council from proceedings, possible preclusion of an accused ever learning the

\(^{21}\) *Hamdan v Rumsfield* at 11-16.
\(^{22}\) *Ibid* at 18.
\(^{23}\) *Ibid* at 22-23.
\(^{24}\) *Ibid* at 30, 36.
evidence used against him in such a closed proceeding and the admissibility of all evidence of any probative value;\textsuperscript{25}

- A conspiracy charge is not a recognised violation of the law of war;\textsuperscript{26}

- Customary international law demands that an accused be present for his trial and privy to the evidence being introduced against him;\textsuperscript{27}

- Trial by military commission creates grave separation of powers concerns, concentrating judicial power in the executive branch while removing the scope for judicial review.\textsuperscript{28}

Arguably, the lessons from the \textit{Hamdan} decision may be limited in the context of Australian domestic application of human rights norms. The political structure, precise role of the national superior court and domestic status of international law instruments, while apparently similar, do differ between Australian and the United States. One difference that must be borne in mind is in the absence in Australia of a Bill of Rights to guide courts adjudicating upon executive branch actions in their decision-making process, the decision making process may not be as directly influenced by the same norms. This is because there is the need in Australia for domestic legislation to deliver international norms with any binding domestic force.\textsuperscript{29} These differences in federal structure and jurisdiction of the ultimate courts of appeal would not appear to assist the adoption of international norms as part of domestic common law.\textsuperscript{30}

\textsuperscript{25} Ibid at 30-33.
\textsuperscript{26} Ibid at 24-25.
\textsuperscript{27} Ibid at 39.
\textsuperscript{28} Ibid at 42.
\textsuperscript{30} Adrienne Stone, “Freedom of Political Communication, the Constitution and the Common Law” (1998) 26 \textit{Federal Law Review} 219 at 220. Commenting on those differences in the context of rights to freedom of speech, Stone observed (omitting footnotes found in the original): “\textit{The influence of American constitutional jurisprudence, and specifically First Amendment law, in the High Court of Australia has never been more significant than in the most adventurous of its decisions on the freedom of political communication}: Theophanous v Herald and Weekly Times Ltd and Stephens v West Australian Newspapers Ltd. \textit{Here, the High Court significantly expanded the protection of political communication by adopting a rule similar to the New York Times v Sullivan doctrine}. That is, \textit{the Court limited the capacity of political figures to bring actions for}
Nevertheless, it remains worthwhile to hypothesise as to what methods available to the High Court that might be employed to decide a similar case. The *Hamdan* decision, clearly establishing the Supreme Court’s jurisdiction and preliminary issues as to the appropriate authority governing the commission’s legality, centres on the roles played by the Geneva Conventions and international customary law in deciding a domestic case.\(^{31}\)

The Conventions formed part of the American law of war as a result of incorporation into the Uniform Code of Military Justice.

As the United States takes a monist approach to international law, ratified treaties automatically become part of domestic law. In Australia, there is no such automatic incorporation. Although Australia may have signed the Geneva Conventions, they have no necessary domestic status in the absence of specific legislative intention to incorporate them. If the High Court were to give effect to these international norms, it would probably have to rely on the doctrine of “legitimate expectation”.\(^{32}\) The claim would be that as the executive had ratified the Conventions, those appearing before an executive-created tribunal would legitimately expect that the Conventions would be taken into account. As discussion below considers, the High Court’s enthusiasm for the doctrine of legitimate expectation appears to be waning. Moreover, the doctrine could be avoided by the competing doctrine of “clear indication”: the Executive’s failure to implement may be considered to show that it does not consider a particular international instrument to give rise to legitimate expectations.

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\(^{31}\) Albeit, a somewhat unique domestic case involving a foreign national appellant detained by the United States military in an offshore leased facility.

Alternatively, a High Court eager to afford protection to the Guantanamo detainees might look to the existing common law rights as decision-making resources. It might, for example, rely on notions of traditional common law protections of free and fair trials. But as the analysis below shows Australian law on fair trial protections at common law are incomplete. Guantanamo detainees, such as Australian David Hicks who has been held in Cuba without charge for five years, would be distressed to hear that Australian common law does not consider a right to trial without delay as central to the requirements of a fair trial. Moreover, in the absence of any constitutional prohibition or guarantee, Australian experiences in immigration law reveal the ease with which common law procedural fairness requirements can be overridden by legislative and executive acts.

The High Court might be willing to apply the interpretative presumption that common law should be applied and that statutes should be interpreted consistently with international law wherever possible. Such an interpretative presumption, however, provides no substantive guarantee that the content of the Geneva Conventions would be given any effect. Even the status of customary international law in Australia is uncertain. But it is currently unlikely to be directly invoked in domestic courts.

It is worth bearing this brief analysis in mind throughout the discussion of Australian law’s approach to its international obligations. The state of Australian law, especially in relation to the willingness of the judiciary to protect human rights, is consistently characterised by uncertainty. When deciding Hamdan v Rumsfield, the Supreme Court was in a position to directly invoke and apply international norms. Despite the fact that the United States is often criticised for its unwillingness to interact with international law, this decision demonstrates that its highest court is clearly capable of giving domestic status to international law. This contrasts with Australia, which has proven

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33 See below discussion of Jago v District Court of New South Wales (1988) 12 NSWLR 558 (Court of Appeal, New South Wales) and (1989) 168 CLR 23 (High Court). See also, in the civil context, Barker v Duke Group Ltd (in liq) (2005) 91 SASR 167, where a defendant, 70 years of age and in poor health, was unable to have a claim brought by a liquidator dismissed as an abuse of process, notwithstanding its being brought more than 15 years after the relevant events.

34 See Section 474 of the Migration Act 1958 (Cth) which defines a “privative clause decision” and ousts the court’s usual jurisdiction to conduct judicial review.

35 As exemplified in Re Minister for Immigration and Ethnic Affairs; ex parte Lam (2003) 214 CLR 1.

36 For example failure to ratify the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.
quick to ratify but reluctant to give domestic effect. The uncertainty of Australian law in this respect is obvious. It may lead to the conclusion that Australia, to use the vernacular, “talks the talk”, but doesn’t “walk the walk”. International human rights norms in the Australian domestic context demand more comprehensive and substantive implementation.

Sources of International Human Rights Norms for Domestic Application within Australia

By “international law”, we intend a number of normative structures governing international relations, both between the States and individuals. The traditional sources of international law include conventions and treaties, international customary law found in the manner in which States deal with one another, general principles of law recognised by civilised nations, judicial decisions and commentary of qualified publicists and jurists.\textsuperscript{37} However, by the term “international human rights norms” generally reference is made to the treaties and covenants entered into between nations and international bodies. It is only those covenants and treaties to which a State is a party that can be expected to implement at the domestic level. Since 1949 Australia has ratified a number of human rights treaties.\textsuperscript{38}

\textsuperscript{37} Article 38, Statute of the International Court of Justice
\textsuperscript{38} Charlesworth, H, Chiam, M, Hovell, D and Williams, G, No Country is an Island – Australia and International Law, Hugh NSW Press, Sydney, 2006, Chapter 3 “Human Rights”, especially at 68-71; Charlesworth et al name following treaties:

- Convention on the prevention and punishment of the crime of genocide;
- Convention relating to the status of refugees/protocol relating to the status of refugees;
- Convention on the elimination of the racial discrimination;
- International covenant on economic, social and cultural rights;
- International covenant on civil and political rights;
- Convention on the elimination of all forms of discrimination against women;
- Convention against torture and other cruel, inhuman or degrading treatment or punishment;
- Convention on rights of the child.

The Human Rights and Equal Opportunity Commission identifies the following human rights as being defined within the Human Rights and Equal Opportunity Act 1986 (Cth) within Section 5 of that Act:

- International covenant on civil and political rights;
- Convention on the rights of the child;
- Declaration on the rights of the child;
- Declaration on the rights of mentally retarded persons;
The ratification of such international human rights instruments creates obligations to implement the relevant norms. The international legal obligation it has at least three levels: to respect, to protect and to fulfil.\textsuperscript{39} The obligation to respect a right requires refraining from action which would inhibit its implementation. As such, it is an obligation which the Executive itself can fulfil. The obligation to protect is more positive in nature. Real protection requires the adoption of legislative measures, executive action and empowering courts to regulate third parties. Protection by each relevant arm of government ensures that other actors within the State cannot inhibit or limit implementation of a right. The level of protection afforded by these measures will, depend upon the State’s commitment to “fulfil”. The obligation to fulfil places the most onerous obligations upon State parties to human rights treaties. The obligation to fulfil requires policy implementation and as such will automatically form part of the internal political balancing act of government confronted with competing objectives. It obliges a State to take positive steps to facilitate the full achievement of a given right. It encompasses providing that right to all members of the State and promoting its importance. Of course, ratification of a human rights instrument creates extensive obligations, often and individual states are left to decide the levels of protection and fulfilment and thereby demonstrate the level of their commitment to the ratified norms.

\textit{The Current Position in Australia}

The federal Parliament is empowered by the Constitution to make laws “\textit{with respect to} … \textit{external affairs}”.\textsuperscript{40} This external affairs power enables the federal legislature to implement by way of legislation international treaties and covenants, including those that contain human rights norms.\textsuperscript{41}

\begin{itemize}
  \item Declaration on the rights of disabled persons;
  \item Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief.
\end{itemize}


\textsuperscript{39} See General Comment No. 14 (2000), \textit{The Right to the Highest Attainable Standard of Health}, Committee on Economic, Social and Cultural Rights discussing the nature of state obligations under the \textit{International Covenant on Economic, Cultural and Social Rights}

\textsuperscript{40} Constitution, s.51(xxix).

In the Constitution itself, there are only a few entrenched human rights that would correspond with international human rights norms. These limited guarantees of individual human rights have been part of the Constitution since Australia’s independence was gained in 1901. They operate mainly to limit legislative and executive action by the federal government. As limited as they are, each of them is amenable to review by courts established under Chapter III of the Constitution, which includes, at the apex of the judicial hierarchy, the High Court of Australia. Those rights that are express include the following:

- Section 51(xxxi), Commonwealth acquisition of property must be on just terms;\(^{42}\)
- Section 80, the right to trial by jury on Commonwealth indictment for an offence against Commonwealth law;\(^{43}\)
- Section 116, the Commonwealth is not to make any law for the establishment of any religion or prohibiting free exercise of any religion;\(^{44}\)
- Section 117, a resident of state may not be subject to any state law that provides for a disability or discrimination;\(^{45}\)

In addition to these limited express rights, the courts have found a number of implied rights, while others have been provided by federal statute:

- Freedom of political communication;\(^{46}\)
- Freedom of political communication as a limitation on the law of defamation;\(^{47}\)

\(^{42}\) Minister of State for the Army \textit{v} Dalziel (1944) 68 CLR 261; \textit{Bank of New South Wales v Commonwealth} (Bank Nationalisation Case) (1948) 76 CLR 1; \textit{Re Director of Public Prosecution; ex parte Lawler} (1994) 179 CLR 270; \textit{Burton v Honan} (1952) 86 CLR 169
\(^{46}\) \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1; \textit{Australian Capital Television v Commonwealth} (1992) 177 CLR 106.
Right to due process in the sense of ensuring equality before the law;\textsuperscript{48}

Privilege of communications between a lawyer and client;\textsuperscript{49}

Privilege of religious confessions;\textsuperscript{50}

Privilege against self-incrimination.\textsuperscript{51}

Overall, the protection of human rights under the Australian Constitution is minimal. The Constitution was drafted in the last part of the nineteenth century, coming into force in 1901. It reflects a belief in the inherent protective mechanisms offered by the common law and democracy itself. The Australian constitution was not a product of turmoil or tyrannical struggle. This explains, in part, its expression in terms of immunities or limitations from legislative or executive powers, rather than granting positive rights to individuals. Those rights which exist are scattered. Despite considering the example offered by the United States’ constitutional Bill of Rights, the drafters of the Australian Constitution were content to rely upon the Westminster system pattern of representative government and the common law to protect its citizens. And it considered that amendment should not be lightly effected. Australia thus remains among only a handful of nations without a Bill of Rights in their constitution.\textsuperscript{52}

The lack of human rights protection in the Australian Constitution is not only a result of historical circumstances and a difficult amendment procedure. There was at the time of drafting much less of a trend towards entrenched rights than has been the experience over the last fifty years. At the end of the nineteenth century, only three models were available for a federal constitution: the United States, Switzerland and Canada.\textsuperscript{53}

Constitutions which came into existence subsequent to the Second World War


\textsuperscript{49} See Evidence Act, 1995 (Cth) s.121. See also Daniels Corporation International Pty Ltd \textit{v} ACCC (2002) 213 CLR 543 at [11]: “Legal professional is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.”

\textsuperscript{50} Evidence Act 1995 (Cth) s.127.

\textsuperscript{51} Evidence Act 1995 (Cth) s.128.

commonly include comprehensive protection of human rights. At the time of its commencement in 1901, the absence of individual rights in the Australian Constitution was even celebrated as proof of its modernity and truly democratic character.  

As mentioned, the Australian Constitution entrenches a procedure for constitutional amendment that has been found to be notoriously difficult. Section 128 requires a national referendum which must be passed by a majority of people as a whole and a majority of people in a majority of states. This latter requirement means that at least four out of six States within the federal system must pass the referendum. Experience highlights the difficulty of amending the constitution. It also provides some explanation as to why those favouring a Bill of Rights are resigned to the fact that it is unlikely to be constitutionally entrenched to incorporate further human rights. However, given its importance to the durability of the protection of rights, discussions on mechanisms for entrenchment that are more politically feasible should not be foreclosed.

**Protection of Human Rights within Australia’s Ad Hoc Model of Implementation**

The Australian Constitution features representative government, a separation of powers and the Rule of Law. However, it does not ensure that international human rights obligations are implemented. Accepting that a ratified international treaty has no direct effect on Australian law, there have been various methods by which international norms have found their way into Australian domestic law. For example, the *International Covenant on Civil and Political Rights* has been attached as a schedule to domestic legislation. This has not been interpreted as necessarily giving the Covenant obligations full status as Australian law. But this approach has not been uniformly adopted and gives rise to uncertainty. It has also attracted international criticism as to the inadequacy of Australia’s implementation of its obligations under international human rights law.

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54 See Hilary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 Law in Context 42.
55 Of the 44 referenda which have been proposed to the Australian people since 1901, only two have been related to human rights. This referendum of 27 May 1967 was by far the most overwhelmingly supported referenda in Australian history. It was passed in all six states and by a national majority of 89.34%. In 1977 an amendment was passed to section 128 to allow residents of Territories to vote in referenda.
56 But this requirement is understandable given the protection it has historically afforded, and continues to afford, the “colonies” which formed the basis for the status upon federation.
57 See Brown v Lizars (1905) 2 CLR 837; Dietrich v The Queen (1992) 177 CLR 292; Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.
58 Human Rights and Equal Opportunity Commission Act 1986 (Cth)
59 See further discussion below. Minogue v Williams [2000] FCA 125
rights treaties. This is supported by the fact that numerous communications against Australia have been made by the United Nations Human Rights Commission. Recognising these current inadequacies, it is necessary to examine current mechanisms for implementing human rights protection. Such protections as exist under the ad hoc approach, fall short of implementing international law obligations.

**Express Constitutional Rights**

The inadequacy of the Australian Constitution's protection of rights arises from their negative expression as “prohibitions”. They have thus attracted narrow construction. Affirmative declarations of rights, as has become the pattern since the emergence of the United Nations, would possibly result in more strident protection.

The following three examples of express rights, namely, religious freedom, trial by jury and democratic and political rights, serve to demonstrate how the inadequacies of their expression, interpretation and dislocation from any a clearly expressed Bill of Rights have failed to promote those rights in Australia.

(1) **Religious Freedom**

Section 116 is one example of drafting that has attracted a narrow interpretation. In the United States the right to freedom of religion is protected by the First Amendment. Section 116 of the Australian Constitution is similar in wording, but has been construed as a nineteenth century statute rather than as part of a Bill of Rights. Although the most direct adoption of an American constitutional provision in the Australian Constitution, it has been confined in its operation more than its American counterpart. Section 116 prohibits the making of law to establish a religion or to limit the free exercise of religion. But the Australian provision goes further than the First Amendment. It prevents use of law to impose religious

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60 In the matter of Toonen HRC Communication No. 488/1992 it was found that legislation in Tasmania criminalising homosexual acts violated Article 17 of the ICCPR. In A, holding of a Cambodian citizen in immigration detention for five years without access to a court of review violated the ICCPR. In Elmi HRC Communication No. 1201 1998, the Commission found that, under the Convention Against Torture, Australia could not send a Somali national back to Somalia due to the risk that he would be tortured. Winata HRC Communication No. 930/2000 found that the deportation to Indonesia of parents while their child remained in Australia violated rights designed to protect children and the family unit.

observance or to administer a religious test as qualification for public office. It too prohibits federal laws ‘establishing any religion’. The American counterpart refers to laws ‘respecting the establishment of religion’. This difference has been seized upon to explain why the American provision has thus been used to provide more extensive protection.62

The small change in wording is arguably a pretext for a judicial attitude that set its face against any expansion of rights from the words of the Constitution. The High Court of Australia has been consistently reluctant to give any wide operation to section 116 without reference to the difference in wording in a number of cases. The following claims that legislation infringes upon religious freedom have been rejected:

- That compulsory peace time military training offends the religious convictions of persons who believe that military service is opposed to the will of God;63

- That the use of war time regulations allowing for the dissolution of any body corporate prejudicial to the defence of the Commonwealth against the Kingdom of Jehovah’s Witnesses was unconstitutional;64

- That the use of legislation for compulsory removal of Aboriginal children from their families prohibited them from access to and free exercise of their tribal religion;65

- That government funding of religious-based schools amounted to an establishment of religion.66

Section 116, so construed, fails to satisfy Australia’s international obligations which require freedom to manifest religion or belief in worship, observance or practice and prevents coercion of any form which would impair freedom to adopt

62 Attorney-General (Victoria); Ex rel Black v Commonwealth (DOGS Case) (1981) 146 CLR 559 per Barwick CJ at 579. See also Lemon v Kurtzman 403 US 602 (1971) and Everson v Board of Education 333 US 1 (1947) and Gedicks, The Rhetoric of Church and State, Chapter 3.

63 Krygger v Williams (1912) 15 CLR 366.

64 Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth (Jehovah’s Witnesses Case) (1943) 67 CLR 116.

65 Kruger v Commonwealth (Stolen Generations Case) (1997) 190 CLR 1

66 Attorney-General (Victoria); Ex rel Black v Commonwealth (DOGS Case) (1981) 146 CLR 559
a given religion or belief. At least some of the claims which have been rejected under section 116 could be maintainable under the broader scope of religious protection offered by international instruments that express rights more affirmatively. The scope of banned legislative activity is much broader. Section 116 does not address itself to the question of whether there has been a violation of human rights. Section 116, has been interpreted so as to have become a virtual dead letter, and cannot be said to satisfy Australia’s international human rights obligations.

The context of a right is critical to its implementation. The dislocation of section 116 from any Bill of Rights, properly so understood, appears to be another reason that it has been interpreted narrowly and had such little practical impact as a tool for protection of religious freedoms in Australia. This separation from a set of express human rights is yet another material distinction from its American counterpart:

'[Section 116] does not form part of a Bill of Rights. The Plaintiff’s claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force … s 116 is a denial of legislative power to the Commonwealth and no more'.

(2) Trial by jury

Another example of restrictive interpretation of Australian constitutional “rights” is section 80, which provides that trial for offences on indictment occur before a

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67 Article 18, International Covenant on Civil and Political Rights.
68 Carolyn Evans, ‘Church-State Relations through a Religious Freedom Prism: The European Court of Human Rights and Church-State Relations’.
69 Such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which was declared to be an international instrument relating to human rights and freedoms for the purposes of the Human Rights and Equal Opportunity Act 1986 (Cth) on 8 February 1993. See Federal Discrimination Law 2005, HREOC, 7 n 23. Article 1 of that declaration provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others.

70 Attorney-General (Victoria); Ex rel Black v Commonwealth (DOGS Case) (1981) 146 CLR 559 per Wilson J at 652.
jury. However, Parliament maintains absolute freedom to define whether an offence is to be tried by indictment. The right to trial by jury can be abrogated by legislative definition of whether an offence is indictable.\(^71\) Returning to the notional Guantanamo detainee, if the case were brought in Australian courts, section 80 would afford them no right to a trial by jury if the offences charged were not classified as indictable. The right to a trial by jury is also limited in that federal law can distinguish between factual elements of an offence and facts relevant to sentencing. Thus, even where there were a right to a trial by jury to determine the committing of an offence, questions of fact relating to sentencing may be determined by a judge alone.\(^72\) As with section 116, the High Court’s interpretation of section 80 has rendered it a virtual dead letter.

(3) Democratic and political rights

A restrictive interpretation of constitutional rights is also evident in the interpretation of section 41. Section 41 of the Australian Constitution provides that:

‘No adult person who has or acquires a right to vote at elections for the more numerous House of Parliament of a State shall, while that right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth’

Prima facie, this creates a right for an adult with a right to vote in State elections to vote in federal elections. However, it has been interpreted as a transitional provision which now has no significance.\(^73\) Apart from this historical purpose, the provision creates no individual rights.

Implied rights

If express rights, to the extent that they exist, are inadequately protected by the Australian Constitution, one might expect courts, in their interpretation of the Constitution, to find certain implied rights. This has sometimes been the case.

\(^71\) R v Bernascone (1915) 19 CLR 629; R v Archdall & Roskruge; Ex parte Carrigan & Brown (1928) 41 CLR 128.
\(^72\) Kingswell v R (1985) 60 ALJR 17.
\(^73\) R v Pearson; ex parte Sipka (1983) 152 CLR 254. The provision was to ensure that women from South Australia and Western Australia, who had been afforded the right to vote in their state elections, were not denied the right to vote at the Commonwealth level upon federation in 1901.
However, again, the protection of rights by implication has proven inadequate, even when the implication is by reference to rights that would seem easy to identify and articulate. The following examples illustrate the inability of the courts to deliver sustained and predictable protection of rights.

(1) Freedom of speech – an implied right

In contrast to the treatment of what on their face would appear to be express rights and freedoms, a comprehensive and innovative development in Australian constitutional law has been the implied freedom of political communication. The implied freedom is said to lie in sections 7 and 24 of the Australian Constitution which establish the lower and upper houses of the Commonwealth parliament. By creating a system of representative and responsible government, these provisions impliedly prohibit legislative interference with forms of political expression necessary to allow the system to function. A law which prevented public criticism of an Industrial Relations Committee was declared invalid. It was held that the right to communicate is vital at a number of levels to make representative government work. Communication must occur vertically, between government and citizens, and horizontally between citizens. Freedom of such communication, it was held, cannot be impinged. In Australian Capital Television, legislation preventing political advertising during elections was invalidated on similar grounds. The scope of freedom of political communication has been extended to include protection of expressive conduct and symbolic speech.

This recognition of an implied right to political communication traces back to McGaw-Hinds (Aust) Pty Ltd v Smith, In that case, Murphy J first judicially acknowledged that the constitution might contain implications:

‘From the nature of our society, an implication arises prohibiting slavery or serfdom. Also the nature of our society, reinforced by the text (particularly Ch. 3, “The Judicature”, and Ch. 1, “The Parliament”) arises

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75 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
76 (1992) 177 CLR 106.
78 (1979) 144 CLR 633.
in my opinion, an implication arises that the rule of law is to operate …
Again, from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication’.79

Although the freedom of political communication has been recognised, the content and extent of freedom of movement and association remains uncertain.80

It is obvious that an implied freedom of political communication is far narrower in scope than an express right to freedom of speech, such as is found in the United States First Amendment. Following the development of an implied right to political communication, the High Court extended it to create a constitutional defence to defamation actions brought by political figures.81 Reference was made in these cases to American first amendment jurisprudence and the rule which prevents a public official recovering damages for defamation unless the defamatory statement was made with actual malice or reckless disregard.82 A similar rule was formulated in Australia: an action for defamation could not be brought if the defendant was unaware of the falsity, not reckless with regard to the truth and reasonable in all the circumstances.83 A law impugning the freedom of political communication could only be allowed where there was compelling specific justification or a compelling social need generally.

Only three years after its statement, the rule regarding the implied freedom of political communication in defamation actions was substantially restated.84 A new test was imposed that was of more specific application. A law could inhibit freedom of political communication where it was reasonably appropriate and served a legitimate end.85 The ‘constitutional defence’ to a defamation action was re-tagged as an extended defence of qualified privilege. As a result, the freedom of political communication cannot be regarded as a free-standing principle of general operation. Its scope is confined to what the specific

84 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
85 Ibid at 567.
provisions of the Constitution are thought to require. This restatement of the test for “freedom of speech” highlights the problem inherent in the process of implying rights: their scope and interpretation is amenable to change in ways that cannot be forecast. Without predictability, those wishing to express opinions cannot know within what limits they may express themselves.

Also, there appear to be difficulties in using American precedent concerning express rights when interpreting the Australian Constitution so as to imply rights. The High Court was eager to ally itself with the American tradition of freedom of speech based on a suspicion of government. This conception of freedom of speech does not follow from the High Court’s identification of freedom of political communication as related to representative government. This difficulty in the use of American precedent is compounded by the differing jurisdiction of the Australian High Court and the United States Supreme Court.

The emergence of an implied freedom of political communication does not signify that the High Court may be willing to imply other constitutional rights. A further implied constitutional right has been suggested to exist in section 51. Section 51 provides the primary grant of legislative power to the Commonwealth. It states that the Commonwealth parliament may make laws for ‘peace, order and good governance’ with respect to the grants of power contained herein. It has been suggested that laws ‘which do not serve, the peace, welfare and good government of our parliamentary democracy … will be struck down as

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86 McGinty v Western Australia (1996) 186 CLR 140.
89 Ibid at 220, quoted at n. 29 above. Unlike its American counterpart, the High Court has jurisdiction over common law matters, allowing it to approach the issue of political communication and defamation from either a constitutional or a common law perspective.
unconstitutional’. But that suggestion has not been embraced by the Australian High Court.

Confusion flows from implying rights in the Constitution. Implied constitutional rights have had to ‘borrow’ from philosophical traditions not entirely consistent with the domestic situation. They overlap with common law doctrines in ways that are frequently difficult to comprehend. The doctrine of implied rights remains controversial and unsettled and the experience underlines a weakness. It is highly unlikely that the provisions of the Australian Constitution will be construed by the Courts in a manner that will enhance the *ad hoc* approach in a manner which will satisfy Australia’s international obligations on human rights.

(2) “Legitimate expectations” as a mechanism for domestic delivery of international norms

One attempt at direct domestic delivery of international human rights norms was in the development of the doctrine of “legitimate expectation” in Australian law. This judicial initiative again evidences the difficulties in common law courts protecting human rights without express constitutional mandate.

The doctrine holds that international conventions ratified by Australia but not legislated may nevertheless be given effect through the application of administrative law principles founding a legitimate expectation. The doctrine was applied in *Teoh*. According to the doctrine, in the absence of contrary statutory or executive indication, ratification of a treaty creates a legitimate expectation that administrative decision-makers will conform to the treaty. In *Teoh*, a Malaysian citizen, facing deportation, argued that the Minister for Immigration was obliged to consider the best interests of the child of the potential deportee due to Australia’s ratification of the Convention of the Rights of the Child. Despite not having been incorporated by domestic legislation, the High

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90 Building Construction Employees’ and Builders Labourers’ Federation v Minister for Industrial Relations (1986) 7 NSWLR 372 per Street CJ at 387.
91 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 per Brennan J at 44. Such an implication would be inconsistent with the notions of parliamentary supremacy. It is also inconsistent with the reality that such words traditionally denote plenary legislative power. They have not been construed at restrictive.
Court gave the Convention effect in the context of executive administrative action.

This expansive expression of doctrine was short lived. Subsequent High Courts have retreated from *Teoh*. In *Lam*, the Department of Immigration investigated the possibility of deporting a permanent resident Lam, by reason of his criminal convictions. The Department represented that contact would be made with the carer of Lam’s Australian resident child before a decision was made. Contact was never made. However, it was held that there had been no breach of natural justice for failure to satisfy a legitimate expectation. The decision in *Lam* required that there be demonstrated unfairness in the administrative action as a consequence of the failure to satisfy the expectation. This additional requirement was not satisfied. Moreover, it was held that although the case involved a foreign deportee with Australian children, the question of the effect of the relevant ratified international treaty dealing with the rights of children did not need to be addressed in *Lam*. It was held that all that *Teoh* created was an entitlement to procedural fairness, not a right to a particular substantive outcome:

> It is not for the judicial branch to add or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs. Rather it is for the judicial branch to declare and enforce the limits of the power conferred by the statute upon administrative decision makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.’

The decisions in *Teoh* and *Lam* are in conflict, although *Lam* did not expressly overrule *Teoh*. *Teoh*, on its facts, broadens the scope of legitimate expectation to include obligations under international conventions. It expands the legal significance of treaty ratification in the context of administrative action by the executive. *Lam* then, on its facts, narrows legitimate expectation, making it dependent on unfairness and demonstrating less willingness to look to international conventions. In light of the conflicting approaches in those cases there would be little hope for the use of “legitimate expectation” to give effect to international instruments to the hypothetical Guantanamo Bay detainee coming

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93 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
94 *Ibid* per Hayne J at 36.
95 *Ibid* per McHugh and Gummow JJ at 6.
before an Australian Court. Any administrative tribunal set up to administer their trials might not be required by an Australian Court to comply with the Geneva Conventions. The Executive would apparently be free, in a case brought before an Australian Court, to state expressly that it did not consider itself bound by those Conventions. The position of express covenants as part of the common law remains fraught with uncertainty.

Uncertainty is also evident in relation to the status of customary international law in Australian domestic law. Unlike treaties, custom is based upon the practice of States in relation to one another. These peremptory norms require no express consent of States to become operative. Australia has struggled with the issue of whether customary law, like treaties, must be formally incorporated as part of domestic law to have domestic effect or whether they are inherently transformative in nature. Some judges do appear willing to give customary law domestic status in the absence of legislative enactment. But the circumstances in which customary international law will be drawn upon are not clear.

The issue remains undecided, and it appears that there is an emerging reluctance to embrace customary international law. If our hypothetical Guantanamo Bay detainee applied to an Australian Court, based on the decision in Lam, it could not be said with any certainty that he would receive the benefit of international human rights norms, whether express, as found in Covenants to which Australia is a party, or customary international law.

Even if consistency were to emerge, the use of court adjudication to implement Australia’s international obligations would remain problematic. In the context of

96 ‘The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not consistent with rules enacted by statutes’ Chow Hung Ching v The King (1948) 77 CLR 449 per Latham CJ at 470-1.

- ‘A rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore ‘conflicts’ with domestic law’ Nulyarimma v Thompson (1999) 96 FCR 153 per Merkel J at 190.

Others have advocated greater caution. The Court is not:

- ‘Free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principles which gives the body of our law its shape and internal consistency’. Mabo, per Brennan J at 43.

97 Charlesworth et al, No Country is An Island, Chapter 3, “Human Rights”.
the separation of powers, human rights are considered better expressed by the legislative branch. Regardless, whether the sentiment against “judicial activism” on the part of unelected judges indirectly incorporating international human rights norms is well-founded or not, there is no discernable movement towards certainty. To date, the Australian people have appeared unwilling to give constitutional status to such rights through their legislature or the Constitution. And the courts have not yet been definitive.

(3) Implied Common Law Rights

The common law remains the one hope for protecting individual rights. Yet, the extent to which a body of law developed incrementally from the “bottom-up” can implement a nation’s international human rights obligations is questionable. Common law develops and reflects contemporary societal values. No amount of judicial activism, however, can legitimately make the jump from reflecting societal values to giving comprehensive legal status to human rights when Parliament has chosen not to do so itself.

Common law rights and privileges that have been recognised by Australian courts include:

- Privilege against self-incrimination;
- Legal professional privilege;
- Right to exclude others from private premises;
- Presumption of innocence;

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98 On 3 September 1988, the Australian people at referendum rejected a constitutional amendment to extend the Constitution’s guarantees of trial by jury, religious freedom and acquisition of property on just terms to create an obligation on states in addition to at Commonwealth level.


100 Note that some of these have been legislatively enshrined. Examples of where the legislature has taken up the initiative of the courts include those mentioned above: Evidence Act 1995 (Cth) sections 121, 127 and 128.


• Qualified right to legal representation for a person charged with a serious offence; 105

• Right to examine material evidence to be used against an accused; 106

• Right of a criminal accused not to be charged more than once for the same offence; 107

• Right of a criminal accused not to be compelled to testify or speak to police; 108

• Right of a criminal accused to have the jury in a criminal tried warned against reliance on uncorroborated police evidence of a confessional statement; 109

• Right for administrative decisions to be made according to procedural fairness 110

A preponderance of developed common law rights manage the rights of a criminal accused, where liberty is at stake. While the common law may have developed numerous implied rights in this area, its recognition of rights more generally is less than comprehensive. The common law cannot come even close to covering the scope of Australia’s international civil and political rights obligations or its international commitments relating to social, economic or cultural rights. And, in any event, the legislature may act to curtail those rights if it is not itself limited by constitutionally entrenched norms.

Even where the common law recognises a particular right that conforms with an independently existing human right norm to which Australia has subscribed by ratification, its extent and content might still well be insufficient to fully effect Australia’s international obligations. An example that would be relevant to our hypothetical Guantanamo Bay detainee is Jago v District Court of New South

104 Woolmington v Director of Public Prosecutions [1935] AC 462; Briginshaw v Briginshaw (1938) 60 CLR 336.
105 Dietrich v The Queen (1992) 177 CLR 292.
Wales & Ors\textsuperscript{111}. In that case, almost a decade elapsed before a criminal accused was brought for trial. The accused sought a permanent stay of the proceedings as an abuse of the process of the court. The New South Wales Court of Appeal found that while there was a right to a fair trial, this did not extend to a right to a speedy trial. This is to be contrasted with the right conferred by the *International Covenant on Civil and Political Rights*, under which persons charged with a criminal offence have the right to be tried without undue delay.\textsuperscript{112}

One positive development and significant use of Australian common law to create rights has been the recognition of native title claims.\textsuperscript{113} Described as a ‘break-through’, it is one concrete example of the common law developing conformably with international law.\textsuperscript{114} In the seminal native title case, *Mabo v Queensland (No 2)* the Court expressly referred to Australia’s international obligations as a pattern for conformity:

> ‘The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of common law, especially when international law declares the existence of universal human rights’\textsuperscript{115}

As unpredictable as the occasions may be, *Mabo* was one instance in which judges were willing to respond to international human rights norms as inspiration when developing common law.\textsuperscript{116} But, as the *Jago* case illustrates, it must be emphasised, such development of common law in this manner has not been consistent.\textsuperscript{117}

\textsuperscript{111} (1988) 12 NSWLR 558. For the High Court appeal decision upholding the Court of Appeal, see (1989) 168 CLR 23. For an example for the refusal to recognize a right to an early trial in the civil context. See *Barker v Duke Group Ltd (In liq.)* (2005) 91 SASR 167.
\textsuperscript{112} Article 14(3)(c).
\textsuperscript{113} *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
\textsuperscript{115} Ibid per Brennan J at 42.
\textsuperscript{117} Refer also to the decisions of *Teoh* and *Lam* above.
(4) Statutory Interpretation

Another example of positive development of the common law to correspond with international norms is in the interpretation of statutes. Australia’s treaty obligations have been used as a tool of statutory interpretation. As far as language allows, a statute may be read consistently with Australia’s obligations under international treaties.  It is not yet clear whether this applies only to statutes that actually purport to implement Australia’s international obligations. It is also unclear if all provisions of international treaties will be called in aid of statutory construction or whether some provisions will be considered merely aspirational and not used.

This use of international law in statutory interpretation fits appropriately within recognised methods of judicial decision-making. However, statutory interpretation cannot represent any significant attempt at implementation of Australia’s international obligations. It remains a tool that will be used when ambiguity in the statute requires it.

In any event, advancement in the common law’s use of international human rights norms can be abrogated by Parliament. This may require clear and unambiguous language. The express words used to abrogate a common law right should evidence that Parliament specifically considered the question of whether or not to abrogate the relevant right.

The development of Australian law under the Migration Act 1958 (Cth) demonstrates the ease with which Parliament can achieve the abrogation of common law rights. The right to procedural fairness in the making of administrative decisions has been expressly removed by sections 51A, 97A,
118A, 127A, 357A, 422B of the Act. These provisions replace common law natural justice with a more limited statutory scheme which is to be a comprehensive statement of procedural fairness requirements under the Act. The legislative history highlights the uncertainty of relying on the common law to protect rights. When the Migration Act was first enacted, it contained what was said to be a comprehensive code of ‘procedures for dealing fairly, efficiently and quickly with visa applications’. The intention of the legislation was to replace common law rules of natural justice. Indeed, the explanatory memoranda of the Bill said as much.\textsuperscript{125} The High Court nevertheless applied a traditional common law approach.\textsuperscript{126} The legislative text could not override the common law without clear expression of that intention. In response, Parliament enacted the provisions mentioned above, which expressly state that the relevant statutory division is an exhaustive statement of the requirements of natural justice. Again, this demonstrates that the common law must always remain an incomplete system of rights protection, subservient to the legislative will, whatever that might be.

Even assuming willingness in the common law courts to recognise human rights, those rights are difficult to assemble comprehensively. An attempt has been made in the form of the Banagalore Principles of 1988.\textsuperscript{127} They are principles recognised in most common law countries, where international law is not enforceable unless incorporated domestically:

\begin{quote}
\textquote{It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes … for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law}\textsuperscript{128}
\end{quote}

The principles have been adopted in some of the Australian judicial decisions discussed above. The statement recognises a role for international law in the development of the common and domestic law without usurping the role of the legislature. International law is not ‘part of’ domestic law. This exclusion may be a

\textsuperscript{125} Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57.
\textsuperscript{126} Ibid.
\textsuperscript{128} Ibid Principle 7.
deliberate choice on the part of the legislative. Absent that choice, reference to general principles of international law is possible. But, again, there exists an uncertainty in the common law as to how it will resolve ambiguity in a statute.

**Legislation**

If the courts are an ineffective vehicle for domestic delivery of human rights protection, what then of the legislature? To date, Australia’s incorporation of its international treaty obligations into domestic law has been minimal. It is, as discussed above, well settled in Australia that incorporation of international law into domestic legislation is necessary to give it certain domestic legal effect:

‘[A treaty] has no legal effect upon the rights and duties of Australian citizens … In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress.’

This need for direct legislative incorporation was highlighted in *Nulyarimma v Thompson*, in which members of indigenous communities who had been removed from their families and assimilated into white society sought to bring action against members of the Australian Parliament for what the complainants considered to be genocide. They relied on Australia’s ratification of the *Convention on the Prevention and Punishment of the Crime of Genocide*. The case failed. The basis was that ‘if genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result’.

The precise legal status of the international treaties which are referred to in the above legislation remains, nevertheless somewhat unclear. The relevant international instruments are not expressly incorporated. They are annexed to the legislation as schedules. The Supreme Court of South Australia has held that this constitutes

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130 Ibid 374.


132 [1999] FCA 1192

133 Ibid per Wilcox J at [22].

enactment into domestic law.\footnote{Collins v South Australia [1999] SASC 257 at [32].} This view was then rejected by the Full Federal Court.\footnote{Minogue v Williams [2000] FCA 125 [23]-[25].} The issue remains unsettled, as the Full Court of the Family Court has observed:

> ‘The fact that [Convention on Rights of the Child] is expressed as a schedule to the Human Rights and Equal Opportunity Commission Act may give it a special significance in Australian law... the nature of this special significance ... has not been determined ... The relevance of a declared instrument annexed to the HREOC legislation this appears to be an open question’.\footnote{B & B v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 451 at [257]-[263].}

Normally, a schedule is deemed to form part of an Act.\footnote{Section 13(2), Acts Interpretation Act 1901 (Cth).} Conflict on this point awaits determination by the High Court or clearer legislative expression.

Legislation implementing human rights obligations has nevertheless proceeded on an \textit{ad hoc} basis. Apart from the discrimination legislation, there is no comprehensive human rights protection by federal legislation. And there is no Bill of Rights to guide the legislative in developing and applying human rights norms.

Further, it is not clear when the legislature will respond to perceived human rights needs or how they will respond. An example arose after the United Nations Human Rights Committee made a finding against Australia in the \textit{Toonen}\footnote{CCPR/C/50/D/488/1992, 4th April 1994.}\footnote{Human Rights (Sexual Conduct) Act 1994 (Cth).}. The Commonwealth, using its constitutional supremacy,\footnote{Constitution, section 109.} legislated to override the Tasmanian legislation which offended the International Covenant on Civil and Political Rights.\footnote{See O’Neill, \textit{et al}, \textit{Retreat From Injustice: Human Rights Law in Australia}, , ‘Chapter 7’.} But following subsequent decisions against Australia by the HRC, the government has not taken similar legal steps.\footnote{} Such an approach to implementation of human rights obligations is hardly satisfactory. It is infected by the obvious risk of leaving domestic, implementation of international obligations subject to political priorities.

A federal system such as Australia’s also bears the problems of inconsistency in the implementation of human rights law across different jurisdictions. The example of religious discrimination and vilification is an example. Discrimination on the basis of
religion is illegal in six jurisdictions but not in New South Wales, South Australia or federally. Vilification on religious grounds is prohibited in only three states. The Victorian legislation has led to a finding that ‘hate speech’ against Muslims by the Christian Catch-the-Fire Ministry was illegal. This case has highlighted tension between the right to hold a belief or to practice a religion and the right to freedom of speech. To what extent can a freedom be used to incite hatred, contempt or ridicule? If the “hate speech” in question had occurred in South Australia, New South Wales, Western Australia or the Northern Territory, no remedy would have been available without attachment to a recognised cause of action. Without commenting on the effectiveness of the anti-vilification legislation as a vehicle for delivery of religious freedom, or upon its impact on freedom of speech, it does seem ironic that the delivery of any freedom, that is internationally recognised, should depend upon which side of a country’s internal state borders one finds oneself. This irony bespeaks the need for a national approach to the implementation of rights.

**Human Rights and Equal Opportunity Commission**

The most extensive domestic legislative implementation of human rights obligations is to be found in the federal and State anti-discrimination laws and the establishment of commissions to oversee their operation. At Commonwealth level, discrimination is dealt with by the Human Rights and Equal Opportunity Commission Act 1986 (Cth), Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth) and Sex Discrimination Act 1984 (Cth). The legislation does not expressly incorporate or use the same language as Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women, but it does, at through the establishment of the Commission and passage of the legislation, implement most of Australia’s obligations under these instruments.

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143 s 7(1)(h) Discrimination Act 1991 (ACT); s 53 Equal Opportunity Act 1984 (WA); s 7(i) Anti-Discrimination Act 1991 (Qld); s 19(1)(m) Anti-Discrimination Act 1992 (NT); ss 16(o), 16(p) Anti-Discrimination Act 1998 (Tas); s 6(i) Equal Opportunity Act 1995 (Vic).

144 ss 124A, 131A Anti-Discrimination Act 1991 (Qld); s 19 Anti-Discrimination Act 1998 (Tas); ss 8, 25 Racial and Religious Tolerance Act 2001 (Vic).


146 As an example of where the law would not administer a remedy to prevent what were alleged to be false religious and archaeological claims concerning the discovery of Noah’s Ark. See Pilmer v Roberts (1997) 80 FCR 303. See also Chapman v Luminis (2001) 123 FCR 62, a case concerning claims of Aboriginal sacred sites.
The Racial Discrimination Act was upheld against a constitutional challenge to its validity. The Act was held not to be an ‘alteration of the original federal pattern of distribution of legislative power … [but] reflects the new global concern for human rights’.

The Human Rights and Equal Opportunity Act incorporates five international instruments into its schedule. The Racial Discrimination Act incorporates the International Convention on the Elimination of all forms of Racial Discrimination as a schedule. The Sex Discrimination Act schedulises the Convention on the Elimination of all Forms of Discrimination Against Women. Other international covenants have been declared to come within the Commissioner’s auspices.

As can be seen, the creation of the federal Human Rights and Equal Opportunity Commission one of the most concrete legislative and administrative steps Australia has taken. The duty of the Commission is to oversee the implementation of the various Commonwealth discrimination statutes. Its brief includes inquiring into or conciliating complaints of unlawful discrimination, dealing with complaints lodged, examining enactments or practices for consistency with human rights, promoting public understanding of human rights and conducting research and educational programmes and providing advice as to the steps required to ensure Australian conformity with our international obligations.

The Commission has proven itself effective. It has interpreted its own role liberally including investigation of complaints of breach of international instruments by the Commonwealth and advising Parliament where legislation should be amended to comply with human rights norms. In the absence of meaningful constitutional protection, comprehensive legislation and consistency in judicial decisions, the Commission is a most robust instrument for protecting human rights. It provides systematic and

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148 Ibid per Stephen J at 218.
152 Ibid s 11.
consistent review of Australia’s position vis-à-vis its human rights obligations. That the Commission has approached its task with zeal is evidenced by the fact that there has been rarely an issue on which Australia has been criticised by an international treaty committee that the Commission had not previously brought to the attention of the Australian government.\footnote{Chris Sidoti. \textit{Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia} (Canberra, 22 March 2001) at 537.}

The Commission fulfils the vital role of human rights education. A human rights culture is imperative for full protection of human rights. Such a belief is reflected in the preamble of the \textit{Universal Declaration of Human Rights}.\footnote{‘Every individual and every organ of society … shall strive by teaching and education to promote respect for these rights and freedoms’} Arguably, in a nation like Australia which has proven reticent to the implementation of a Bill of Rights, such education is of special significance. This is part of the vital role of the Commission.

The Commission has been prolific in publications, media releases and maintaining of internet materials on human rights. The public debate and scrutiny which would accompany the adoption of a Bill of Rights would be the ably assisted by the Commission. In the meantime, the Commission fulfils an important role in education as to human rights\footnote{See its website at \url{www.humanrights.gov.au}.} and giving a limited set of remedies for contravention of the Acts it administers.\footnote{See \textit{Federal Discrimination Law 2005}, HREOC, Chapter 7.}

\textbf{A Bill of Rights for Australia: Towards a More Comprehensive Implementation}

The obvious method to remedy the inadequacies of the \textit{ad hoc} approach is through a national Bill of Rights. Australia is alone among modern nations in its omission of such a Bill from its legislative framework. Even nations without a formal written constitution, such as New Zealand and the United Kingdom, have legislated to implement Bills of Rights.

Despite its claims to being a free society those freedoms, when tested at the margins, such as in the cases of those accused of sedition or terrorism\footnote{See \textit{Anti-Terrorism Act (No 2) (2005)} (Cth). See also comments of the President of Human Rights and Equal Opportunity Commission, John von Doussa QC, on the lack of judicial review under the new anti-terrorism laws at \url{www.abc.net.au/news/newsitems/200510/s1494760.htm} made 31 October 2005. See} or those seeking
asylum, appear to have deficiencies in their protection. Some commentators argue that Australia is not suited to a Bill of Rights: Australia attempts to domestically immunise itself from critical outside voices, including that of international law. Australia has historically demonstrated a degree of legal and political conservatism. It ratified the *Optional Protocol to the International Covenant on Civil and Political* rights allowing complaints by individuals to the International Court of Justice. Yet there remain areas of human rights that are untouched by domestic legislation. A Janus-faced approach to international norms is evident from its willingness to participate in the drafting of international human rights treaties while remaining hesitant to legislate domestically.

On the other hand, below the federal level of government, a number of individual Australian jurisdictions are enacting their own Bills of Rights. There evidences that there may be nothing inherent in the Australian social, political or legal psyche that makes a national Bill of Rights inappropriate.

Various models for a Bill of Rights warrant consideration. The United States model of constitutionally entrenched rights, enforceable by the judiciary, is a prominent example. It would appear, however, that none of the existing models provide a perfect example to follow for the implementation of human rights norms at the domestic level. New Zealand and the United Kingdom have the deficiencies of lacking entrenchment and direct

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161 It took eleven years before the federal parliament enacted legislation allowing it to legislate extra-territorially and preventing the Imperial parliament from legislating without Australian consent. *Statute of Westminster 1931* was not enacted in Australia until 1942, although its operation was made retrospective to 1939. It was not until 1986 that the power of the Imperial parliament to override legislation of Australian states was removed and appeals to the Privy Council ended. *Australia Acts 1986* (Cth) and (Imp).

162 See Charlesworth *et al.*, *No Country Is An Island*, 65. See Chapters 2 and 3 generally.

163 See, e.g., the *Human Rights Act 2004* (ACT).
access by affected individuals to courts upon contravention of a right. In New Zealand, domestic legislation specifically implements most international obligations. This legislation requires legislation to be interpreted consistently with the Bill of Rights “wherever possible”. Rights are not protected from displacement by later legislation. In regard to the New Zealand legislation, the United Nations Human Rights Committee noted that ‘the provisions of the Covenant have not been fully incorporated into domestic law and given overriding status’. The United Kingdom, the birthplace of the common law, has now codified its international obligations in a comprehensive legislative guarantee of rights and freedoms, but leaves potential for more strident protection.

Even the American Bill of Rights, though entrenched and providing access to court for review of breaches, does not give effect to all the rights and freedoms included in the International Covenant for Civil and Political Rights.

Some more modern constitutions include comprehensive Bills of Rights which encompass the full range of rights expressed in the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Bill of Rights contained in the Constitution of the Republic of South Africa is noteworthy for the scope and extent of its human rights obligations. But a direct constitutionally entrenched model is not a practical method for Australian implementation of human rights obligations because of the practical difficulties in amending.

Other models for implementation of international obligations, outside the common law tradition, have passed special legislation. France, the Netherlands, Switzerland and

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165 Ibid, s 6.
166 Ibid, s 4.
169 Ibid, s 4.
171 Section 7 to 39.
172 See discussion above on section 128.
Argentina have chosen to give the International Covenant on Civil and Political Rights meaning as domestic law with a special status. This status is superior to ordinary domestic law and allows provisions of the Covenant to be directly invoked by the courts.173

In nations of the common law tradition, domestic entrenchment of rights obligations with less than constitutional status has been adopted as a model. The Canadian Charter of Rights and Freedoms174 provides protection to satisfy most of Canada’s international obligations. The rights in the Charter are subject to reasonable limits as prescribed by law in a democratic society.175

Within Australia, some Bills of Rights have been enacted or are in the process of enactment. The first such Act was passed in the Australian Capital Territory.176 The Act implemented civil and political rights. However, it ignored social and economic rights. The Act allows for rights to be reasonably limited where justified in a free and democratic society.177 But, individual enforcement is limited. If the Supreme Court is satisfied that a Territory law infringes the Act it issues a declaration of incompatibility. Such a declaration does not effect any legal obligations or rights.178 It merely obliges the Attorney-General to compile a report into the incompatibility and present it to Parliament.179 The effectiveness of this model for a federal Bill of Rights is questionable. Australia would continue in its failure to provide individuals an effective remedy. Its international obligations, therefore, would remain unfulfilled.

In Victoria, a Charter of Rights and Responsibilities180 has been proposed. The Charter provides a more robust model. It

- Requires the responsible government minister to introduce laws to Parliament with reasoned statements of compatibility with the Charter;181

173 Ibid, at 287. There are difficulties of manner and form in the Anglo-Australian tradition that prevent adoption of this method.
175 Section 1, Canadian Charter of Rights and Freedoms.
176 Human Rights Act 2004 (ACT).
177 Ibid s 28.
178 Ibid s 32.
179 Ibid s 33.
180 Charter of Human Rights and Responsibilities Bill 2006 (Vic)
• Provides that government and those in public functions act unlawfully in failing to give effect to rights on the Charter;\textsuperscript{182}

• Provides explicit remedies\textsuperscript{183}

The Victorian Bill, however, still allows Parliament to override the Charter.\textsuperscript{184}

If Australia were to adopt a Bill of Rights to satisfy its international obligations, that Bill should display a number of characteristics. Enforcement of rights requires the availability of remedies to end rights violations, compensate for its effects and prevent further violations do not occur.\textsuperscript{185} Entrenchment of rights is also imperative. If domestic law protecting rights are not given entrenched status they can be changed by subsequent legislation. They remain subject to political whim.\textsuperscript{186}

**A Uniquely Australian Model**

An appropriate model to satisfy Australia’s international obligations must provide remedies and entrenchment, but avoid the difficulties of constitutional amendment. As mentioned at the outset, and has been demonstrated by reference to the examples given above, the current approach to implementation gives incomplete effect to international obligations, such as those contained in the *International Covenant on Civil and Political Rights*,\textsuperscript{187}:

\begin{quote}
to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant …
ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity …
ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy …
ensure that the competent authorities shall enforce such remedies when granted.
\end{quote}

\textsuperscript{181} Ibid s 28.
\textsuperscript{182} Ibid s 38.
\textsuperscript{183} Ibid s 39.
\textsuperscript{184} Ibid s 31.
\textsuperscript{186} Ibid, at 294.
\textsuperscript{187} Ratified by Australia on 13 November 1980.
Apart from the limited remedial powers of the Human Rights and Equal Opportunity Commission, little can be said to provide an effective remedy for violations with respect to rights contained in the Covenant. There are also questions, outside the work of the Commission, as to the overall efficacy of efforts put forward to satisfy the human normative obligations to respect, to protect and to fulfil.\textsuperscript{188}

As mentioned, the model proposed been only combine a constitutional referral of powers with the agreement to a co-operative legislative scheme by each Australian government if there were some norm that was not capable of being embraced by a federal exercise of legislative power under the external affairs power\textsuperscript{189}

A feature of the Australian national governmental structure is what is termed co-operative federalism. It enables the various jurisdictions, through their governments, to co-operate in the achievement of national goals that would be unachievable by any single constituent member. Its hallmark is the annual Council of Australian Governments, known by its acronym, COAG. In recent times, COAG has been hailed as a most successful instrument for the good government of the country.\textsuperscript{190} COAG is a vehicle for legislative and executive co-operation that can deliver what might be otherwise constitutionally impossible for the various individual jurisdictions. Co-operation has taken the form of agreements on legislative schemes in areas such as company law\textsuperscript{191}, court jurisdiction\textsuperscript{192} and competition law\textsuperscript{193}. There is no reason why human rights could not be the subject of such a scheme.

\textsuperscript{188} See General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health, Committee on Economic, Social and Cultural Rights discussing the nature of state obligations under the International Covenant on Economic, Cultural and Social Rights, cited above at n 40.
\textsuperscript{189} Section 51(xxxvii); Constitution Act 1900. The Constitution provides for the parliament of states to refer a matter to the Commonwealth parliament, thus vesting power to make law in regards to this matter with the Commonwealth.
\textsuperscript{190} Of the COAG meeting held 14 July 2006, Victorian State Premier Steve Bracks said "... we don't just simply take pot shots at each other but work on real reform and change on behalf of the Australian people," Queensland State Premier, Peter Beattie said "Those who seek to denigrate this relationship don't understand it... COAG meetings get better every year... This relationship between the States and the Commonwealth is probably the best in Australia's history and look at the results we've produced today... it will deal with the things that will give us the competitive edge in the world." See further at: http://www.abc.net.au/news/newsitems/200607/s1687155.htm
\textsuperscript{191} See for examples the passage of a model Companies Code1984 by the federal Parliament as territory legislation, adopted by each of the States and the referral of powers to pass the federal Corporations Act 2000 (Cth) to fill lacunae in the respective legislative powers.
\textsuperscript{193} Implementation of the Competition Code to overcome inadequacies on the part of both federal and State legislative powers to deal with all entities and aspects of competition.
One early example of such a scheme was in *Jurisdiction of Courts (Cross-Vesting) Acts 1987*. Those Acts were implemented uniformly to allow for efficient transfer of matters between Australian courts and ensure that no superior court in Australia lacked jurisdiction if it existed in another superior court in the country. The *Competition Code* is another example. The Competition Principles Agreement, entered by all Australian governments in 1994, involved a scheme secured by agreement among the governments of the Commonwealth, the six States and the two Territories for the purpose of achieving and maintaining consistent and complementary competition laws and policy. This was to ensure that the Code was comprehensive in its jurisdictional reach, so that every entity was embraced by its operation.

The various Acts that implemented the scheme were the subject of the *Competition Code Agreement*, which provided financial incentives to the States to participate in implementation of the Code. It required each state party to ensure that the relevant piece of uniform legislation was passed within its jurisdiction. The agreement also specifies that any modification to the *Competition Code*, once enacted, would only occur following consultation with and agreement of all other participating jurisdictions. Withdrawal from the scheme can only be on six months notice.

Such a co-operative legislative scheme, entrenched by inter-governmental agreement, provides a model for the implementation of Australia’s human rights obligations. Adjustments to the scheme could make it more appropriate to the human rights context. The Commonwealth, State and Territory governments could commit themselves to ensuring the passage of a uniform Bill of Rights through their parliaments. Agreement would be reached as to appropriate procedures for amending the Bill once enacted. Entrenchment would be achieved without resort to the amendment process of section 128.

This approach would overcome hurdles at which previous attempts faltered. However, it does require a coalition of political wills. Proposals have been previously listed for parliamentary consideration in 1974 and in 1985\(^{194}\).

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If we assume the existence of that will at some stage in the future, a Bill of Rights could be implemented that would have greater status than ordinary law. It would make possible a relatively well entrenched Bill that could provide ordinary citizens direct access to courts for remedies. It would not only better fulfil international obligations, but also be consistent with the tradition of judicial reviews of legislative and executive acts that forms part of Australian law.

**Conclusion**

International human rights treaties and norms are an essential part of the global legal and political landscape. Their efficacy depends on the willingness of state parties to undertake domestic implementation. As a State that is committed to human rights, Australia has yet to definitively demonstrate its commitment to domestic implementation so as to adequately supplement the operation of the Human Rights and Equal Opportunity Commission. A Bill of Rights is a critical step towards showing that it does ‘respect fully human rights standards, especially those of the Covenant, which have been developed as statements of the ideal at international level, and ensure that they are given a primary role in the reform and development of national law’.¹⁹⁵

A co-operative legislative model avoids the need for constitutional amendment in order to achieve entrenchment. By means of intergovernmental checks and balances, it provides entrenchment, protecting against any individual government’s political whim and ill considered repeal or abrogation. It creates national uniformity. It would bring Australia in line with the rest of its common law cousins. Lastly, but not least, it will demonstrate that Australia takes its international rights obligations seriously.

And if such a Bill were to become part of the domestic law, it may just give a detainee at a military facility, a refugee, or a member of a religious or ethnic minority some hope of a fair procedural outcome before an Australian court and security of rights under domestically implemented human rights norms.